

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

Kevin Maurice Smith,

Petitioner,

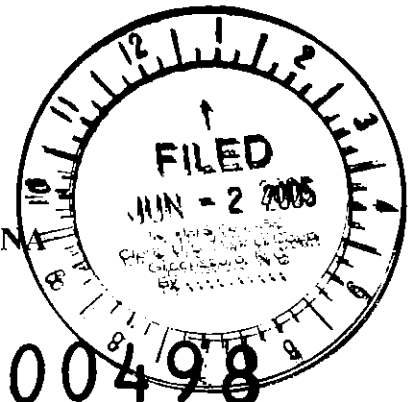
v.

United States of America,

Respondent.

1:05 CV 00498

1:98CR369-1



RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a federal prisoner, has submitted a motion for reconsideration pursuant to Fed. R. Civ. P. 60(b). In the motion, petitioner is attacking his conviction or sentence based on recent Supreme Court cases rather than seeking to remedy a defect in the collateral review process. The motion for reconsideration therefore must be construed as a motion to vacate sentence under 28 U.S.C. § 2255. See United States v. Winestock, 340 F.3d 200 (4th Cir.), cert. den ed, 540 U.S. 995, 124 S.Ct. 496, 157 L.Ed.2d 395 (2003). As such, petitioner's pleading is defective because he has failed to file his claims on the proper Section 2255 forms. See Rules Governing Section 2255 Proceedings, Rule 2(b).

There is no need to put petitioner through the extra work of submitting his claims on the proper forms, however, because Court records reveal that petitioner has already challenged this conviction in a previous Section 2255 action. [No. 1:01CV665] Therefore, the present pleading should be dismissed for lack of jurisdiction because of petitioner's failure to obtain permission from the Fourth Circuit for a second or successive Section 2255 action, as is required by 28 U.S.C. § 2244 and 28 U.S.C. § 2255. See Winestock, 340 F.3d at 200. Petitioner was recently sent copies of the forms to apply for such permission, therefore no forms will be sent to him but he may request them from the Clerk if needed.

IT IS THEREFORE RECOMMENDED that petitioner's "Rule 60(b)" motion be construed as an attempt by petitioner to file a second or successive Section 2255 action.

IT IS FURTHER RECOMMENDED that this action be dismissed due to petitioner's failure to obtain certification from the Fourth Circuit as required by 28 U.S.C. §§ 2244 and 2255 and Fourth Circuit Local Rule 22(d).

/s/ P. Trevor Sharp
United States Magistrate Judge

Date: June 2, 2005